

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ALAN D. MULYCK**

Claimant

VS.

**WILCOX PAINTING CONTRACTORS**

Respondent

AND

**BUILDER'S ASSOC. SELF-INS. FUND**

Insurance Carrier

Docket No. 1,022,913

**ORDER**

Respondent and its insurance carrier request review of the June 10, 2005 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment with respondent and ordered temporary total disability benefits and medical treatment.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment. Respondent argues the claimant's back injury occurred while he was moving a coffee table at his home and his request for benefits should be denied. Respondent further argues the claimant's restrictions were accommodated and that claimant would be still working if he had not terminated his employment with the respondent. As a result respondent concludes claimant is not entitled to temporary total disability benefits.

Claimant denies he suffered a back injury at his home and argues the reason he is no longer working is because the respondent's owner told him there was no light duty work available. Consequently, claimant requests the Board to affirm the ALJ's Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On March 21, 2005, claimant was moving five-gallon paint buckets when he noticed a "jar" in his back and it began hurting. Two days later, the claimant notified the respondent's secretary of his accident. Claimant was referred by respondent to Dr. Steven R. Hughes for medical treatment.

A co-worker, Joseph Hunter, testified that on March 21, 2005, claimant kind of hinted to him that he had hurt his back on his coffee table at home but then claimant had changed his story and "sarcastically" said that his back was injured at work lifting paint buckets. Claimant denied that he told Mr. Hunter that he had injured his back at home.

On March 23, 2005, claimant was seen by Dr. Hughes with complaints of low back pain due to lifting some heavy paint buckets. The doctor placed restrictions of no prolonged standing or walking, no climbing, bending, or twisting and no lifting over 10 pounds. Claimant returned on March 30, 2005, for a follow-up visit and noted he was having increased pain in the right buttock area and hip. The doctor diagnosed the claimant as having mild degenerative disk disease with acute exacerbation of low back pain. Dr. Hughes recommended physical therapy three times a week for two weeks, an MRI and changed his restrictions to no prolonged standing or walking, no climbing ladders, no bending more than five degrees, no twisting, no lifting more than ten pounds. On April 15, 2005, the MRI of the lumbar spine revealed degenerative disk disease and spinal stenosis with no evidence of nerve root encroachment. Claimant returned again on April 21, 2005, with complaints of pain down both legs but was still working within restrictions. The doctor diagnosed degenerative disk disease with secondary spinal stenosis producing chronic back pain. Dr. Hughes recommended an epidural and also referred him to a neurosurgeon for surgical consultation.

On April 28, 2005, claimant was examined by Dr. Paul S. Stein and provided a history of injury lifting paint buckets at work. The claimant was complaining of back and leg pain. Dr. Stein diagnosed the claimant as having disk degeneration and some protrusion at L4-L5 and L5-S1 with possible nerve root irritation on the left at L4-L5. The doctor recommended epidural steroid injections.

The claimant continued working with restrictions from March 21, 2005 through May 16, 2005, but experienced an increase in back pain. Claimant testified that he was told on May 16, 2005, that the respondent did not have any light-duty work. Conversely, Virgil G. Wilcox, the owner of Wilcox Painting, testified the claimant was able to work under his previous restrictions and he would still be allowed to work under his restrictions.

Initially, respondent argues claimant suffered his back injury at home and, accordingly, is not entitled to workers compensation benefits. Claimant testified he injured his back lifting paint buckets at work and denied that he told a co-worker that he had injured his back at home on a coffee table.

In workers' compensation litigation, it is claimant's burden to prove entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> This matter hinges almost entirely upon the credibility of the witnesses. All the witnesses – claimant as well as Mr. Wilcox and Mr. Hunter – testified before the ALJ at the preliminary hearing. In granting claimant the benefits requested, the ALJ apparently determined the claimant more credible than respondent's witnesses. The Board concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify. And in this instance, the contemporaneous medical records from claimant's initial visit to the doctor indicate he provided a consistent history of a work-related accident. The Board's review of the record compiled to date suggests it is reasonable to rely on the ALJ's determination of credibility in this case and affirms the ALJ's determination that claimant suffered an accidental injury arising out of and in the course of his employment.

Respondent further argues claimant's restrictions would have been accommodated but claimant simply chose not to work. As a result respondent concludes claimant is not entitled to temporary total disability compensation. Conversely, claimant disputes that he was offered continued accommodated work.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?<sup>2</sup>

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.<sup>3</sup>

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, Judge Barnes did not exceed her jurisdiction.

The issue of whether claimant's medical condition and employment situation entitle claimant to receive temporary total disability benefits is not an issue that is reviewable from

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<sup>1</sup> See K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

<sup>2</sup> K.S.A. 44-534a(a)(2).

<sup>3</sup> K.S.A. 2004 Supp. 44-551(b)(2)(A).

a preliminary hearing order. At this juncture of the proceeding, the Board does not have the authority to reweigh the evidence and redetermine if claimant is temporarily and totally disabled.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.<sup>4</sup>

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 10, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2005.

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>4</sup> K.S.A. 44-534a(a)(2).